IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-769

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS PENSION TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS VACATION TRUST FUND, TRUSTEES OF THE COLORADO LABORERS HEALTH AND WELFARE TRUST FUND, and TRUSTEES OF THE CONSTRUCTION ADVANCEMENT PROGRAM,
Petitioners,
v.
BURTON LEVY, CONCRETE PLACERS, INC. a Colorado corporation, and CELLULAR CORPORATION OF COLORADO, a Colorado corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER
By: Terry Noble Fiske, Attorney of Record, and
Pamela M. Martin
1200 American National Bank Building
Denver, Colorado 80202
(303) 534-1200
Attorneys for Petitioners

INDEX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. .....

TRUSTEES OF THE COLORADO CEMENT
MASONS APPRENTICE TRUST FUND,
TRUSTEES OF THE COLORADO CEMENT
MASONS PENSION TRUST FUND,
TRUSTEES OF THE COLORADO CEMENT
MASONS VACATION TRUST FUND,
TRUSTEES OF THE COLORADO LABORERS
HEALTH AND WELFARE TRUST FUND, and
TRUSTEES OF THE CONSTRUCTION
ADVANCEMENT PROGRAM,
Petitioners,
v.
BURTON LEVY, CONCRETE PLACERS, INC.,
a Colorado corporation, and
CELLULAR CORPORATION OF COLORADO,
a Colorado corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on August 17, 1979.

OPINIONS BELOW

The District Court for the District of Colorado rendered no opinion. That court's order for summary judgment in favor of respondent Levy is appended hereto as Appendix A. The judgment of the District Court in favor of petitioners and against respondents Concrete Placers, Inc. and Cellular Corporation of Colorado is appended as Appendix B. The opinion of the Court of Appeals for the Tenth Circuit has not been reported. A copy of that opinion is appended hereto as Exhibit C.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on August 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

The rule involved is Rule 56 of the Federal Rules of Civil Procedure, reproduced below:

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

QUESTIONS PRESENTED

The only question presented is whether a party may have summary judgment without presenting proof, by affidavit or other evidentiary material, of the absence of a genuine issue of material fact, but based solely on the assertions of his attorney.

STATEMENT

This action was brought by petitioners, the trustees of various employee benefit funds and an industry promotion fund, to recover sums due to them as third party beneficiaries of a collective bargaining agreement between Concrete Placers, Inc. and the State Conference of Colorado Operative Plasterers and Cement Masons International Association. Jurisdiction was alleged and admitted under 29 U.S.C. §185.

In their original complaint, petitioners sought to recover from Concrete Placers a then unknown amount, consisting of contributions, liquidated damages, attorney's fees, audit fees, and costs of collection, due to them under the terms of the collective bargaining agreement. The petitioners further sought to impose personal liability on respondent Burton Levy for the sums owed by Concrete Placers, on the basis that Levy was the alter-ego of Concrete Placers. Early in the proceedings, petitioners deposed Burton Levy, and as a result of information developed during the deposition, amended their complaint, naming Cellular Corporation of Colorado as an additional party defendant on the grounds that Cellular was an alter-ego to both Levy and Concrete Placers.

Following the pre-trial conference, the trial court issued an order to show cause, which required the attorney who had signed the petitioners' pleadings (but who did not attend the conference, which was attended by another lawyer in the same firm) to file a written statement setting forth the specific factual information upon which he relied in making allegations regarding Levy's personal liability, together with any additional information respecting that issue which had been developed to that date. By the same order, all proceedings other than the required response to the order to show cause were stayed until the further order of the court. Counsel timely filed his response to the order to show cause, which was dated May 9, 1977. Notwithstanding that portion of the order which stayed all other proceedings until further

order, on June 9, 1977 Levy filed a motion for summary judgment, together with a "statement of position" which was, in effect, a memorandum in support of the motion. This "statement," signed by Levy's attorney, was the only material offered in support of Levy's motion; no affidavits or other evidence were offered. The petitioners deemed themselves still bound by the order of May 9, 1977, since no further order had been entered vacating the stay of proceedings. On June 24, 1977, they accordingly filed a motion for relief from stay, to which the court made no response.

Having received no response to their motion for relief from stay, the petitioners prepared material in opposition to Levy's motion for summary judgment, but they did not file this material prior to the hearing, since to do so would be contemptuous of the order of May 9. This material, which the court accepted at the hearing, consisted of a memorandum, an evidentiary affidavit, and an affidavit under Fed. R. Civ. P. 56(f), which reiterated the petitioners' request for permission to depose Levy further. After a brief hearing, the trial court granted Levy's motion, dismissing the amended complaint as to him. Following trial to the court on the remaining issues, judgment was entered in favor of petitioners and against both corporate respondents on December 5, 1977, after which petitioners moved to amend the judgment of dismissal as to Levy. Upon denial of the motion, petitioners appealed the portion of the judgment dismissing Levy from the action to the United States Court of Appeals for the Tenth Circuit, the corporate respondents appealed the judgments against them, and all judgments were affirmed.

The following facts (having been recited in the documents listed in the court's order) were considered

by the trial court in ruling on Levy's motion for summary judgment:

1. When the auditor, engaged by the petitioners to determine the hours of covered employment performed by Concrete Placers employees, asked Levy for certain records and governmental reports, Levy responded that no such reports were filed by Concrete Placers and that no such company as Concrete Placers existed.

2. At the same interview between Levy and the auditor, Levy stated that employees of Concrete Placers were paid by another company.

3. Levy had signed the union agreement as president of Concrete Placers.

4. Concrete Placers, Inc., originally incorporated in 1969, changed its name to Cellular Corporation of Colorado on April 27, 1972.

5. A new corporation, named Concrete Placers, Inc., was incorporated on April 27, 1972.

6. The second Concrete Placers signed the union agreement on May 3, 1972.

7. Concrete Placers and Cellular Corporation used the same employees, paid employees from the same bank account, employed the same supervisory and office personnel, and occupied the same office space.

8. Concrete Placers did union jobs and Cellular Corporation did non-union jobs.

REASONS FOR GRANTING THE WRIT

1. The affirmance by the Court of Appeals of the trial court's dismissal of petitioners' claim against Levy is in direct conflict with the decision of this Court in *Adickes* v. *Kress & Co.,* 398 U.S. 144 (1970). The opinion in that case unequivocally established the respective

burdens of the parties to a motion for summary judgment. Levy, as the moving party under Fed. R. Civ. P. 56(c), had the burden of showing the absence of any genuine issue of material fact. Levy made no showing whatsoever, but urged, through the arguments of his counsel, that it was incumbent upon petitioners to establish the truth of their claims against Levy upon his motion for summary judgment. The acquiescence of the courts below in this theory is contrary to the established law on the question. That law, as enunciated in *Adickes, supra,* is that the party opposing the summary judgment motion has no burden at all, unless and until the moving party demonstrates the absence of a genuine issue of material fact. Levy's "Statement of Position," which was the only document proffered by him in support of his motion, was attached by the Court of Appeals to its opinion and therefore appears in Appendix C. It will be seen to have been totally insufficient to warrant entry of summary judgment in his favor.

In this document, Levy's counsel treated attorney Wadle's response to the order to show cause as though it were an attempt by the plaintiffs to obtain summary judgment. The Court of Appeals also misconstrued Wadle's response, stating that "the response to the order to show cause on behalf of the plaintiffs is not of any legal consequence." (Appendix C). The response to order to show cause was filed not on behalf of the plaintiffs but on behalf of Wadle himself, to whom the court's order was personally directed, as the attorney who had signed the pleadings. Had the response been an attempt to support a motion for summary judgment on the part of plaintiffs, as it was treated, the trial court would no doubt have been justified in denying such a motion. But the motion for summary judgment was Levy's, and its sole support was his counsel's argument that Wadle's response

did not state facts sufficient to establish Levy as the alter-ego of the corporate defendants.

This attempt to reverse the respective burdens of the moving party and the opposing party was successful in the Court of Appeals, which said: "We have examined the the other grounds asserted by the plaintiffs showing that Levy was the alter ego of Placers, and *they failed to establish this contention.*" (Appendix C). (Emphasis added). Levy had failed to meet his burden, as defined by *Adickes,* of establishing the absence of a genuine issue of material fact, but at best had shown that plaintiffs had adduced insufficient facts to prevail on a genuine, existing issue. Thus the plaintiffs had no burden to "establish" anything at that stage, but should have been allowed to offer proof of their contentions at trial. Moreover, even had Levy met the moving party's burden, even the Court of Appeals recognized that the circumstances of the case might be said to be "somewhat suspicious" (Appendix C), thus impliedly acknowledging that plaintiffs had raised inferences to support the alter-ego theory. Even had Levy's motion been properly supported, then, the granting of his motion would still have been error, since the facts presented by the plaintiffs gave rise to inferences which could support a judgment in their favor. Such inferences should have been viewed in the light most favorable to plaintiffs. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962).

2. This Court, as well as Congress, has long demonstrated a concern for the integrity and fiscal soundness of employee benefit funds such as those administered by the petitioners. The granting of this petition would further the Court's long-established policy in these matters.

CONCLUSION

For the foregoing reasons, the Court is respectfully asked to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

TERRY NOBLE FISKE
GORSUCH, KIRGIS, CAMPBELL, WALKER and GROVER
1200 American National Bank Building
Denver, Colorado 80202
(303) 534-1200
Attorneys for Petitioners

Of counsel:
PAMELA M. MARTIN

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 75-M-1150

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS PENSION TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS VACATION TRUST FUND, TRUSTEES OF THE COLORADO LABORERS HEALTH AND WELFARE TRUST FUND, and TRUSTEES OF THE CONSTRUCTION ADVANCEMENT PROGRAM, *Plaintiffs,* v. BURTON LEVY, CONCRETE PLACERS, INC., a Colorado corporation, and CELLULAR CORPORATION OF COLORADO, a Colorado corporation, *Defendants.*	ORDER FOR SUMMARY JUDGMENT AS TO DEFENDANT LEVY

Upon the hearing held this day on the motion of defendant Levy for summary judgment and considering the allegations of the original complaint, filed October 28, 1975; the amended complaint filed February 27, 1976; the response of May 24, 1977 to the order to show cause of May 9, 1977; the statement of position of defendant Levy and the plaintiffs' memorandum in opposition to the motion for summary judgment, the court finds and concludes that the plaintiff has presented no evidence or supportable statements of fact indicating any

basis for individual liability of the defendant Burton Levy, and it is

ORDERED that the complaint, amended complaint and this civil action are dismissed as to the defendant Burton Levy.

Dated: July 22, 1977. BY THE COURT:

s/ _____
Richard P. Matsch, Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 75-M-1150

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS PENSION TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS VACATION TRUST FUND, TRUSTEES OF THE COLORADO LABORERS HEALTH AND WELFARE TRUST FUND, and TRUSTEES OF THE CONSTRUCTION ADVANCEMENT PROGRAM,
Plaintiffs,

v.

BURTON LEVY, CONCRETE PLACERS, INC., a Colorado corporation, and CELLULAR CORPORATION OF COLORADO, a Colorado corporation,
Defendants.

JUDGMENT

Pursuant to and in accordance with the oral findings of fact and conclusions of law given by the Honorable Richard P. Matsch after a trial to court on December 1, 1977, it is

ORDERED AND ADJUDGED that the plaintiffs recover from the defendants, Concrete Placers, Inc. and Cellular Corporation of Colorado, jointly, as follows: Trustees of the Colorado Cement Masons Apprentice Trust Fund $5,078.94 in contributions and $740.62 in

liquidated damages; Trustees of the Colorado Cement Masons Pension Trust Fund $59,744.00 in contributions and $6,172.93 in liquidated damages; Trustees of the Colorado Cement Masons Vacation Trust Fund $54,217.50 in contributions and $5,663.77 in liquidated damages; Trustees of the Colorado Laborers Health and Welfare Trust Fund $30,565.48 in contributions and $3,118.72 in liquidated damages; and Trustees of the Construction Advancement Program $4,518.17 in contributions and $712.13 in liquidated damages.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff-Trustees of the Colorado Cement Masons Apprentice Trust Fund, the Colorado Cement Masons Pension Trust Fund, the Colorado Cement Masons Vacation Trust Fund and the Construction Advancement Program recover auditor's fees of $700.00, and plaintiff-Trustees of the Colorado Laborers Health and Welfare Trust Fund recover auditor's fees of $155.00. In addition, plaintiffs are awarded attorneys' fees of $4,200.00, for a total judgment of $175,587.26 with interest thereon as provided by law from the date hereof until paid, plus court costs and such further costs and expenses which may accrue in the satisfaction hereof. Costs are to be taxed by the Clerk of the Court upon filing of the Bill of Costs. Said Bill of Costs must be filed within ten days after entry of this judgment.

DONE AND ORDERED this _____ day of _____, 1977.

APPROVED BY THE COURT:
FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

By: _____
Stephen P. Ehrlich,
Chief Deputy

APPENDIX C

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

Nos. 78-1057 and 78-1058

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS PENSION TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS VACATION TRUST FUND, TRUSTEES OF THE COLORADO LABORERS HEALTH AND WELFARE TRUST FUND, and TRUSTEES OF THE CONSTRUCTION ADVANCEMENT PROGRAM, *Plaintiffs-Appellants Cross-Appellees,* v. BURTON LEVY, CONCRETE PLACERS, INC., a Colorado corporation, and CELLULAR CORPORATION OF COLORADO, a Colorado corporation, *Defendants-Appellees Cross-Appellants.*	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 75-M-1150)

Eve M. Hernquist of Gorsuch, Kirgis, Campbell, Walker and Grover (Pamela M. Martin and John D. Thompson of Gorsuch, Kirgis, Campbell, Walker and Grover, on the brief), for Plaintiffs-Appellants.

Matthew D. Skeen of Lohf and Barnhill, P.C. for Defendants-Appellees.

Before HOLLOWAY, McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The basic issue in this case is one with which we are confronted not infrequently and that is whether the trial court erred in granting a motion for summary judgment, that is, whether there existed any genuine issue or issues of fact.

Plaintiffs-appellants are Trustees of the Colorado Cement Masons Apprentice Trust Fund, Trustees of the Colorado Cement Masons Pension Trust Fund, Trustees of the Colorado Cement Masons Vacation Trust Fund, Trustees of the Colorado Laborers Health and Welfare Trust Fund, and Trustees of the Construction Advancement Program. The defendants in the case are Burton Levy, Concrete Placers, Inc., a Colorado corporation, and Cellular Corporation of Colorado, a Colorado corporation. There is a cross-appeal on behalf of these appellees. It would seem that the corporations, defendants-appellees, are more or less lacking in funds, and so the main thrust of the action must turn to one Burton Levy, who is now said to be the alter ego of Concrete Placers, Inc., and therefore liable in the Trustees second claim for relief.

THE PROCEEDINGS IN THE DISTRICT COURT

Plaintiffs-appellants prevailed at the trial as against Concrete Placers, Inc. and Cellular Corporation of Colorado. However, the trial court granted the motion for summary judgment filed on behalf of the individual defendant-appellee Burton Levy.

This suit was filed on October 28, 1975, pursuant to § 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1965). The disputed aspect is the propriety of the granting of summary judgment in favor of Burton Levy. The second claim for relief in the original complaint alleges that "Burton Levy has so thoroughly ignored the corporate form of Concrete Placers, Inc. and acted as the alter ego of said corporation so as to become individually liable for the obligations of said corporation." The answer alleges that the activity of the defendant was carried out on a corporate basis. In the third claim of the amended complaint filed April 1, 1976, the same allegation is made as to Burton Levy.

A *pretrial conference* was held on May 5, 1977, and one of the issues that was framed was whether Levy was the alter ego of Concrete Placers and whether Levy signed the contract in his corporate capacity. A minute order appears as of May 5, 1977, in which Michael Wadle was ordered to show cause "as to the basis for the filing of the complaint against Burton Levy on October 28, 1975 and what basis there is for it today."

Subsequently, on May 9, a formal order to show cause was issued by the court. This recited that the court had requested a statement of the facts which the plaintiff relied on to support the allegation of liability of Burton Levy contained in paragraph 2 of the second claim for relief of the complaint filed October 28, 1975. This order

went on to say that Mr. Thompson (attorney for the plaintiffs) was unable to supply any such information and had indicates that need existed for discovery on that issue.

The order further said that counsel for the defendants had advised the court that no such information as to facts relied on had been supplied by plaintiffs in response to interrogatories directed to that issue.

As a result of all of this effort, the court issued an order directed to Michael Wadle, attorney for plaintiffs, requiring him, on or before May 25, 1977, to file a written statement setting forth the specific factual information on which he relied in making the subject allegations in the second amended claim for relief in the amended complaint and any additional information which had been developed in this case considering the liability of Burton Levy individually. A further order was that all other proceedings be stayed until further order of the court.

FACTS OFFERED TO SHOW ALTER EGO

In response to the written court order directed to attorney Wadle dated May 9, 1977, there was filed on May 24, 1977, a response to order to show cause which set forth the information relied on by the plaintiffs as follows:

1. The signature of Burton Levy on the collective bargaining agreement as president of Concrete Placers, Inc.

2. The information contained in the letter dated January 28, 1975, from Gary Frank, an auditor for Plaintiffs, addressed to Ms. Pamela Martin of our office which indicates that Burton Levy stated that Concrete Placers, Inc. the

nominal signatory to the agreement at issue in this action did not exist. (Exhibit 1 hereto).

3. In addition, the letter referred to indicates that Burton Levy admitted that union employees were paid from another company under which Mr. Levy did business.

4. The information provided the undersigned by Plaintiffs at delinquency committee meetings to the effect that Burton Levy was operating through numerous business entities, using the same employees on both union and non-union projects in order to avoid paying fringe benefit contributions to Plaintiffs.

In addition to the foregoing, the following information has developed in this case to date:

1. That Concrete Placers, Inc. underwent a name change to Cellular Corporation of Colorado on or about April 27, 1972.

2. That Burton Levy then formed a second Concrete Placers, Inc. on April 27, 1972.

3. That the Second Concrete Placers, Inc. executed the collective bargaining agreement through Burton Levy on May 3, 1972.

4. That Concrete Placers, Inc. and Cellular Corporation of Colorado used the same employees, paid employees from the same bank accounts, employed the same supervisory and office personnel, and occupied the same office space.

5. That Concrete Placers, Inc. would bid union jobs while Cellular Corporation would bid non-union jobs in an apparent attempt to

defraud Plaintiffs, using Concrete Placers, Inc. merely as a conduit for Cellular Corporation of Colorado and/or Burton Levy's personal transaction of business.

Levy filed a lengthy response, copy of which is appended hereto. There is no necessity in going through its details because we are of the opinion that the response to the order to show cause on behalf of the plaintiffs is not of any legal consequence, unfortunately for the plaintiffs.

THE MOTION FOR SUMMARY JUDGMENT

On June 9, 1977, Levy filed a motion for summary judgment. This was heard on July 22, 1977. At this time there was a request by the plaintiffs for further discovery and, particularly, an opportunity to take a further deposition of Levy. He was asked by the court:

THE COURT: Let me ask you this, Mr. Wadle. Why didn't you cover this matter when you took Mr. Levy's deposition before?

MR. WADLE: Your Honor, when his deposition was taken before we had no idea of the number of entities that he was operating, and primarily that deposition was to discover the entities in order to obtain the record of all those entities and audit those records to determine whether there was a liability owing to the Defendants.

That audit was completed in October 1976 and showed a total liability of nearly $200,000. And the deposition was very brief at that time, simply to locate the record and obtain an audit, itself.

The court asked him how many depositions he intended to take. He said:

MR. WADLE: Your Honor, I certainly didn't intend to take it more than once, but based on the information that was discovered at the initial deposition, we feel it was necessary to retake that deposition and to prepare thoroughly for one more deposition.

The court pointed out that Mr. Wadle made an allegation that Levy was personally liable in the original complaint filed in October 1975. The court said that he would think that he would have asked him the question at the time of the first deposition. The court then granted the motion for summary judgment against Levy and the cause was set for trial as to the corporate defendants.

The final question for this court was whether the record disclosed a viable issue of fact bearing on the question of Levy's liability. We are of the opinion that no such issue is to be gleaned from the record.

Certainly the fact that Burton Levy signed the agreement as president of Concrete Placers, Inc. is not significant.

Secondly, the letter from plaintiffs, although indicating that Levy had stated that Placers' auditor did not exist, does not establish that Levy is the alter ego of Placers. Of itself this is certainly not significant.

We have examined the other grounds asserted by the plaintiffs showing that Levy was the alter ego of Placers, and they failed to establish this contention. The concept of operating through a corporation and the concept of acting as an alter ego are distinct and different. In order to establish as a matter of law that the corporate veil should be pierced and that an individual should be held

liable for actions that were carried out in the name of a corporation, it must appear that the corporation was being misused in some manner. For example, that its funds were being diverted or a fraud, constructive or express, was being carried out. We have nothing of this character here.

The most that can be said in the case at bar is that the circumstances are somewhat suspicious. There is no indication, for example, as to whether an excessive salary was paid to Mr. Levy or whether the funds that belonged to the pension fund were diverted or whether some kind of fraud was committed. As we view it, then, the problem is that there is a lack of facts, and since there was a failure to develop anything during the entire period that the case was on file, a period which approached two years, the inference to be drawn is that there are no such facts. If there existed some promise that evidence of fraud or misuse of funds would likely develop, we would take a different view of the matter. However, in the absence of any such evidence the trial court was not obligated to extend the life of the case as to Mr. Levy.

It is our conclusion that the judge was fully justified, considering the dearth of evidence in the record, in entering judgment. We have no alternative except affirmance of the judgment of the district court.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 75-M-1150

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, *et al.*,
Plaintiffs,

v.

BURTON LEVY, *et al.*,
Defendants.

STATEMENT OF POSITION OF DEFENDANT LEVY

This Court, in light of certain questions raised at the May 5, 1977, pre-trial conference concerning the factual basis for Burton Levy's inclusion as a defendant in this action, issued a show cause order to Plaintiffs' counsel. After reviewing both the order and response, Defendant Levy has no desire to challenge the good faith of Plaintiffs' counsel in filing the complaint, but does wish to make clear his position that there is not now, nor has there ever been, a basis for disregarding the Concrete Placers, Inc. entity and imputing direct personal liability against him. Defendant Levy, through his undersigned counsel, accordingly submits this statement both to establish his position and to support his Motion for Summary Judgment.

I. FACTUAL BASIS

Plaintiffs filed their complaint on October 28, 1975, alleging that Concrete Placers, Inc. ("Placers") had failed to comply with certain provisions of its collective bargaining agreement with the State Conference of Colo-

rado Operative Plasterers and Cement Masons International Association, Inc. (the "Union"), in that Placers had (1) failed to make reports and payments for fringe benefit contributions for certain periods in 1973 and 1974 and (2) refused to allow Plaintiffs to audit its books and records. The First Claim for Relief directed these allegations to Placers; the Second Claim for Relief directed these allegations against Levy as the alter ego of Placers.

Since the filing of the original complaint, Plaintiffs have received responses to all their requests for admissions, interrogatories and requests for production; moreover, they have audited the books and records of Placers and Cellular Corporation of Colorado ("Cellular") and fully explored Levy's knowledge in a deposition taken February 18, 1976. As a result of the information received through discovery, Plaintiffs amended their complaint on April 20, 1976, to include Cellular as a Defendant.

In their recent Response to Order to Show Cause, Plaintiffs indicate that there were four reasons for naming Levy individually as a Defendant in the original complaint, each of which merits individual attention:

1. *"The signature of Burton Levy on the collective bargaining agreement as President of Concrete Placers, Inc."*

No one has disputed the fact that Levy signed the contract in a representative capacity; indeed, Plaintiffs allege in their Complaint that "Defendant Concrete Placers, Inc. by Burton Levy, executed the 1972-1975 Cement Masons Construction Agreement . . ." *Complaint,* paragraph 7. What has not been made clear, however, is how Levy can become liable in his individual capacity for signing a contract in an admittedly representative capacity.

2. *The January 28, 1975, letter from Plaintiffs' auditor to Plaintiffs' counsel which indicated Levy had stated that Placers did not exist.*

While Plaintiffs now claim that this was specific factual information upon which they relied in making their allegations against Levy, neither the letter nor its contents were disclosed to Levy in response to his interrogatory asking for identification of each transaction, oral communication and/or agreement which Plaintiffs claim as the basis for their allegation that Levy is the alter ego of Placers.* Moreover, while Levy does not admit making that statement, he is at a loss to understand how a single statement to a union auditor years after the transactions in question, even if made, would be cause to disregard a valid corporate entity.

3. *The January 28, 1975, letter, which indicated that Levy admitted that Union employees were paid from another company under which Mr. Levy did business.*

---

* "2. Identify each transaction, document, oral communication and/or agreement which you claim as the basis for or evidence your allegation that Levy is the alter ego of Concrete.

ANSWER: The basis for the allegation that Levy is the alter ego of Concrete is the deposition referred to in Interrogatory No. 1 [taken on 2/18/76 of Levy by Michael J. Wadle] and the signature page to the 1972-75 Cement Masons Building Construction Agreement with the State Conference of Colorado Operative Plasterers and Cement Masons International Association executed by Levy on or about May 3, 1972. The subject matter of this document is a collective bargaining agreement. The document is signed by Levy and William F. Swanson. This document was received by Levy. The original of this document is in the possession of Cement Masons Local Union No. 577, Denver, Colorado. *"Answer to Defendants' First Interrogatories to Plaintiffs,* June 10, 1976.

As indicated above, neither this letter nor the contents were disclosed to Levy prior to this time, More fundamentally, while such a statement may be evidence tending to establish that Placers should be disregarded so that a recovery may be obtained from the other company, it in no way indicates that Levy himself should be personally liable. At best, it indicates a mixture of two companys' business; it does not show that intrusion of Levy's personal indentity into corporate affairs which is the *sine qua non* of the alter ego notion.

4. *Plaintiffs' information to the effect that Levy was operating through numerous business entities, using the same employees on both union and non-union projects in order to avoid paying fringe benefit contributions to Plaintiffs.*

This contention, also omitted from the interrogatory response, is essentially an extension of the thinking reflected in the immediately preceding paragraphs. Even if true, such information could only be evidence leading to the disregard of Placers' identity in order to obtain recovery from other "business entities;" in no way could it establish Levy's personal liability. These points may suggest, absent adequate explanation, that the Placers' entity was not respected by other business entities, but are completely irrelevant to the question of Levy's abuse of the Placer's entity to achieve personal ends.

Cellular was added as a Defendant following Levy's deposition, apparently on the grounds that (1) Placers had changed its name to Cellular on April 27, 1972, (2) a new Placers was formed on April 27, 1972, (3) the new Placers executed the collective bargaining agreement on May 3, 1972 (4) Placers and Cellular used the same employees, paid employees from the same bank accounts, employed the same supervisory and office personnel, and

occupied the same office space, and (5) Placers did union jobs while Cellular did non-union jobs in an apparent attempt to defraud Plaintiffs, using Placers merely as a conduit for Cellular and/or Levy's personal transaction of business.

All of these arguments may be important evidence on the question of the Placers/Cellular entity question; in no way, however, do these facts suggest that Levy himself has disregarded the corporate entity in such a way as to generate personal liability. Plaintiffs' fifth point is an excellent example: after alleging that Placers and Cellular divided union and non-union business between themselves in an apparent attempt to defraud the union, Plaintiffs conclude, without any stated basis, that Placers may have been used for Levy's personal transaction of business. Nothing in Plaintiffs' response shows such abuse of the corporate entity as would justify ignoring the entity to obtain relief from Levy.

II. SUMMARY JUDGMENT

Levy certainly does not contend that there are no material facts in dispute; indeed, several of the allegations made in Plaintiffs' Response would be hotly contested at trial. For purposes of the Summary Judgment Motion only, however, Levy asks the Court to believe that all of Plaintiffs' allegations in their Response are true, on the grounds that even if they were in fact true, there would still be no basis for Levy's personal liability.

While Colorado does not have extensive case law on piercing the corporate veil, those cases that do exist clearly indicate that a close corporation, even one that is informally controlled and operated, is not per se objectionable, but should be disregarded only if it has been used to fraudulently limit liability. *Fitzgerald v. Central*

Bank & Trust Co., 257 F.2d 118 (10th Cir. 1958); *Shamrock Oil & Gas Co. v. J. E. Ethridge*, 159 F.Supp. 693 (D. Colo. 1958); *Contractors Heating & Supply Co. v. Sure*, 163 Colo. 584, 432 P.2d 237 (1967). These courts have suggested that the corporate entity should be disregarded only in those situations where not to do so would defeat public convenience, justify wrong, protect fraud or defend crime; in virtually every case, they caution that this is a special equitable notion which must be considered in light of the unique facts and circumstances of each case. *Sell v. United States*, 336 F.2d 467 (1964); *Fitzgerald, supra; Industrial Commission v. Lavitch*, 165 Colo. 433, 439 P.2d 359 (1968).

In this case, after more than nineteen months of discovery, Plaintiffs have produced no reasons to hold Levy personally liable for alleged defaults in Union contributions other than those discussed above. In virtually every case, Plaintiffs' evidence establishes at best an issue of material fact as to whether the distinction between Cellular and Placers should be broken down; in no respect do they suggest that the distinction between Levy and Placers should be abrogated. The only possible point which could even suggest such a result is the Union auditor's statement that Levy told him that no entity such as Placers existed. While this may have been plausible foundation for an alter ego theory two years ago, Plaintiffs now know that there is indeed such a corporation and that it has indeed followed all the requisite formalities in the conduct of its business.

III. FURTHER DISCOVERY

Defendant Levy anticipates the possibility that Plaintiffs may respond to the Motion for Summary Judgment by suggesting that the past nineteen months have not been sufficient to discover the facts establishing Levy's personal liability, and that a further deposition is necessary. At this time, Levy merely wishes to observe that Defendants have not presented this Court with any allegations or information which would justify pursuing further discovery. In their response, Defendants represented to the Court that

> [e]ssentially the same discovery is required to establish the double-breasted employer as to show personal liability of Burton Levy. *Response*, p. 3.

Levy's deposition has already been taken once; by definition, then, Plaintiffs should already have discovered the necessary facts to establish Levy's personal liability. There were no limitations or restrictions placed on the scope of the questioning at Levy's first deposition; all questions which Plaintiffs wished to ask were presented and answered at that session.

Levy's objection to a second deposition is not interposed for fear of the facts, but for fear of expense. While Levy recognizes that such matters are not before the Court and therefore cannot be considered in respect to the summary judgment motion, Levy represents to the Court that a further deposition would establish that: (1) at no time did he own even 50% of the Placers' stock; (2) at no time was the corporation thinly capitalized, in that it was never burdened by long-term debt during its operation; and (3) it operated from offices at 301 Vallejo in Denver, a corporate place of business which was separate and distinct from the personal residences of Placers' shareholders and officers.

In summary, a second deposition will not improve Plaintiffs' case; it will merely add to Levy's expense in defending a baseless claim. For these reasons, Defendant Levy would request that this Court, if it allows a second

deposition to be taken, consider imposing reasonable costs and attorneys' fees upon Plaintiffs' attorneys pursuant to 28 U.S.C. §1927, if that deposition produces no material evidence furthering Plaintiffs' case against Levy.

IV. CONCLUSION

Once again, we wish to stress that Defendant Levy is willing to accept the fact that Plaintiffs' counsel filed the Complaint in good faith; he merely wishes to make clear that whatever facts or ideas originally prompted the contention of his personal liability were mistaken. There simply is no reason to disregard the Corporate Placers, Inc. entity so as to hold Burton Levy personally liable for its alleged debts to Plaintiffs.

LOHF & BARNHILL, P.C.
Robert Shaiman
David G. Ebner

BY _____

2410 Prudential Plaza
1050 Seventeenth Street
Denver, Colorado 80265
(303) 623-5224

AFFIDAVIT OF SERVICE

The undersigned, upon oath, hereby states that three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT were deposited in the United States mail, first class postage prepaid, on November 14, 1979, in Denver, Colorado, addressed to the attorneys for Respondents as follows:

MATTHEW D. SKEEN, *Esq.*
Lohf & Barnhill, P.C.
2410 Prudential Plaza
1050 17th Street
Denver, Colorado 80265

Pamela M. Martin

PAMELA M. MARTIN
Attorney for Petitioners
1200 American National Bank Building
Denver, Colorado 80202

State of Colorado
City and County of Denver } ss.

Subscribed and sworn to before me this 14th day of November, 1979 by Pamela M. Martin.

Robert L. Metzger

Notary Public, State of Colorado

ROBERT L. METZGER
NOTARY PUBLIC
STATE OF COLORADO
My commission expires Jan. 25, 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-769

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS PENSION TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS VACATION TRUST FUND, TRUSTEES OF THE COLORADO LABORERS HEALTH AND WELFARE TRUST FUND, and TRUSTEES OF THE CONSTRUCTION ADVANCEMENT PROGRAM,
Petitioners,

v.

BURTON LEVY, CONCRETE PLACERS, INC. a Colorado corporation, and CELLULAR CORPORATION OF COLORADO, a Colorado corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF BURTON LEVY IN OPPOSITION

LOHF & BARNHILL, P.C.

By: Ernest W. Lohf, Attorney of Record, and
Matthew D. Skeen
Attorneys for Respondents

2410 Prudential Plaza
1050 Seventeenth Street
Denver, Colorado 80265
(303) 623-5224

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-769

TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS PENSION TRUST FUND, TRUSTEES OF THE COLORADO CEMENT MASONS VACATION TRUST FUND, TRUSTEES OF THE COLORADO LABORERS HEALTH AND WELFARE TRUST FUND, and TRUSTEES OF THE CONSTRUCTION ADVANCEMENT PROGRAM,
Petitioners,

v.

BURTON LEVY, CONCRETE PLACERS, INC. a Colorado corporation, and CELLULAR CORPORATION OF COLORADO, a Colorado corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF BURTON LEVY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. C)

and the judgments of the District Court (Pet. App. A and B) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on August 17, 1979. Petitioners filed their petition for a writ of certiorari on November 15, 1979, invoking the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether summary judgment may be granted in favor of a defendant stockholder against plaintiffs who, after availing themselves of repeated opportunities for discovery, presented no evidence or facts adequate under local law to support their conclusory allegations that the stockholder and other corporate defendants were alter egos.

RULE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure, which is reproduced at Pet. at 2-4.

COUNTER STATEMENT OF THE CASE

Petitioners filed their original complaint on October 28, 1975, naming as defendants the respondents Concrete Placers, Inc. ("Concrete Placers"), a Colorado corporation, and Burton Levy, a Colorado resident who is a stockholder of Concrete Placers. Petitioners immediately began discovery by simultaneously serving a Request for Production, a Request for Admissions and an Interrogatory. They served a Second Interrogatory in December 1975. They deposed Levy on oral examination on February 18, 1976. On

February 26, 1976, Petitioners filed a Motion for Leave to Amend Complaint and directed a Request for Production to respondent Cellular Corporation of Colorado ("Cellular"), also a Colorado corporation of which Levy is a stockholder. Petitioners joined Cellular as a defendant in their amended complaint on April 1, 1976. The Respondents complied with all Petitioners' discovery requests.

Petitioners' original complaint sought to recover from Concrete Placers certain sums allegedly owed to Petitioners as third party beneficiaries of a collective bargaining agreement between Concrete Placers and the State Conference of Colorado Operative Plasterers and Cement Masons International Association. In addition, the original complaint sought recovery from Levy on the theory that he "was the alter-ego of Concrete Placers" (Pet. at 5).

Petitioners' amended complaint also contended that Cellular "was an alter-ego to both Levy and Concrete Placers" *(id.)*. Neither the original complaint nor the amended complaint stated any specific facts upon which Petitioners relied in asserting Levy's personal liability for any corporate obligation. Petitioners appear to contend that Levy committed acts, never identified, which would permit a court to ignore Concrete Placers and Cellular as corporate entities and to hold Levy personally responsible for their obligations. All pertinent acts or transactions occurred in Colorado.

At the pre-trial conference, the District Court attempted to ascertain and limit triable issues, in accordance with Rule 16 of the Federal Rules of Civil Procedure, and specifically asked counsel for Petitioners to state the factual basis of their allegations against Levy. Petitioners' complaint against Levy then had been on file for more than a year; Levy's deposi-

tion had been taken; other discovery had been had; and Levy previously had requested from Petitioners the same information then sought by the District Court. Nonetheless Petitioners were unable to advise the District Court of any facts adequate to support their allegations against Levy. The pre-trial conference concluded with the District Court's order, directed to the attorney who had signed Petitioners' complaints, requiring him to file in writing the specific factual information upon which he relied and any additional information concerning the liability of Levy, individually, which had been developed. The attorney filed his response, Levy filed his motion for summary judgment and Petitioners filed a brief in opposition, supported by affidavits. See Pet. at 5-6.

After a hearing in open court, the District Court granted Levy's motion, concluding that Petitioners had presented "no evidence or supportable statements of fact" indicating any basis for Levy's individual liability. Pet. App. A at 11-12. The Court of Appeals carefully considered all grounds asserted by Petitioners on appeal from the District Court and concluded that the District Court was fully justified, considering the dearth of evidence, in entering a summary judgment and was not obligated to extend the life of the case as to Mr. Levy. Pet. App. C at 22. The Court of Appeals accordingly affirmed the judgment of the District Court.

ARGUMENT

This case involves only the application of established principles, primarily of Colorado law, to its particular facts. Respondent suggests that Petitioners' real complaint is not so much with the application of Rule 56 as with the application of Colorado law by

the Court of Appeals and the District Court in determining that all factual allegations which Petitioners proffered, even if proved, were insufficient to permit any piercing of the "corporate veil" of either Concrete Placers or Cellular. The decision below is correct, and there is no reason for further review.

I

Speaking through Circuit Judge Doyle, formerly both a Colorado federal district judge and a justice of the Colorado Supreme Court, the Court of Appeals stated the principles applicable to piercing the corporate veil as follows:

> In order to establish as a matter of law that the corporate veil should be pierced and that an individual should be held liable for actions that were carried out in the name of the corporation, it must appear that the corporation was being misused in some manner. For example, that its funds were being diverted or a fraud, constructive or express, was being carried out. We have nothing of this character here.

Pet. App. C at 21-22

Petitioners have not disputed the foregoing principles, which involve questions of Colorado law under the facts presented. Petitioners and their counsel have had ample opportunities to discover and identify "some manner" in which Levy "misused" either Concrete Placers or Cellular. Petitioners propounded written interrogatories to Levy and, in addition, took his deposition upon oral examination. Levy, in turn, propounded written interrogatories to Petitioners asking them to identify each transaction, document, oral communication or agreement which Petitioners

claimed was a basis for or evidence of their allegation that Levy was the alter ego of Concrete Placers.

The opinion below demonstrates that the Court of Appeals and the District Court correctly applied Rule 56. For purposes of his motion for summary judgment, Levy admitted as true all of Petitioners' factual allegations. Pet. App. C at 27. The District Court correctly concluded that, based on all factual allegations made, no claim against Levy could be sustained. *See, e.g., Industrial Commission v. Lavack,* 165 Colo. 433, 439 P.2d 359 (1968); *Contractors Heating and Supply Co. v. Scherb,* 163 Colo. 584, 432 P.2d 237 (1967); and *Fink v. Montgomery Elevator Company of Colorado,* 161 Colo. 342, 421 P.2d 735 (1966). Levy did not argue, nor did either court below hold, that Petitioners had the responsibility of "proving" their allegations in order to oppose Levy's motion for summary judgment. Levy's position was, and is, that Petitioners had the minimal obligation of at least alleging facts which, viewed in the light most favorable to Petitioners, would support their claim against him. Absent even a sufficient allegation, after repeated discovery, which would support the Petitioners' claims, there was no genuine issue as to any material fact and summary judgment was appropriate.

II

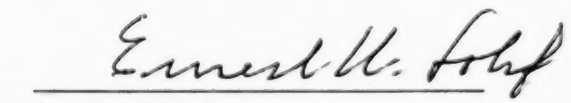
The decision of the Court of Appeals does not conflict with the decision of this Court in *Adickes v. Kress & Co.,* 398 U.S. 144 (1970), or any other decision of this Court. In *Adickes,* this Court held that a defendant's motion for summary judgment was improperly granted when the plaintiff had alleged and testified that a policeman was in the defendant's store during

the incident giving rise to plaintiff's claim under 42 U.S.C. § 1983 for conspiracy to violate her constitutional rights. The presence of the policeman was a substantial fact which could support an inference of such a conspiracy. Here there was, and is, no comparable factual allegation.

CONCLUSION

The decision below comports with well established principles of Colorado law and presents no significant federal question of substance or procedure justifying any exercise of this Court's discretion to permit further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,



Ernest W. Lohf
LOHF & BARNHILL, P.C.
2410 Prudential Plaza
1050 Seventeenth Street
Denver, Colorado 80265
Telephone: (303) 623-5224

Attorneys for Respondents

Of counsel:
Matthew D. Skeen